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No. 07-394

In the Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, ET AL.,
PETITIONERS

v.

SANDRA K. OMAR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The court of appeals' split decision in this case represents an extraordinary intrusion on the decisions of a multinational military force operating under a U.N. mandate in a foreign combat zone, a foreign sovereign's right to enforce its criminal laws for offenses within its own borders, and our Executive's own authority to conduct military and foreign affairs. Nothing in the brief in opposition diminishes the importance of the questions presented or the need for this Court's review.

A. The Jurisdictional Question Warrants Review

The court of appeals asserted jurisdiction to review the detention of an individual by a multinational force operating overseas in a theater of active hostilities pursuant to a U.N. mandate. Pet. App. 14a-15a. Respondent argues (Br. in Opp. 13-23) that the court of appeals'

jurisdictional holding is correct, but respondent's own counsel acknowledges that the analytical foundation for that holding—which is centered on the lack of a foreign conviction—is "simply irrational." See Pet. at 19, *Munaf* v. *Geren*, No. 06-1666 (filed June 13, 2007). The jurisdictional rules developed by the court of appeals are fundamentally unsound and merit this Court's review.

1. As explained in the petition, *Hirota* v. *MacArthur*, 338 U.S. 197 (1948) (per curiam), establishes that United States courts lack jurisdiction to review the detention of individuals abroad pursuant to international authority, including individuals held by United States forces acting under American command as part of a multinational force. Pet. 11-16. The court of appeals acknowledged that this case is just like *Hirota* in that respondent is detained "overseas" by a "multinational force," Pet. App. 11a, but held that *Hirota* is inapposite because respondent has not yet been convicted by a foreign tribunal, *id.* at 13a. That was error because *Hirota*'s jurisdictional rule turns on whether a prisoner is in custody under the authority of the United States or of a multinational entity, not on whether an individual has been convicted by a foreign tribunal. Pet. 13-14.

a. Respondent argues (Br. in Opp. 19-22) that *Hirota* stands only for the proposition that this Court lacked original jurisdiction over the habeas petition in that case. But the *Hirota* Court did not say a word about this Court's original jurisdiction. Nor has any lower court read *Hirota* as being limited to this Court's original jurisdiction. Instead, this Court framed its holding in broad terms concerning the power of "the courts of the United States." 338 U.S. at 198. Thus, as the District of Columbia Circuit has consistently recognized from the year after *Hirota* was decided and ever since,

"no court" has jurisdiction to review a habeas petition falling within *Hirota*'s ambit. *Flick* v. *Johnson*, 174 F.2d 983, 984, cert. denied, 338 U.S. 879 (1949); see *Munaf* v. *Geren*, 482 F.3d 582, 583 (2007), petition for cert. pending, No. 06-1666 (filed June 13, 2007).

b. Respondent argues (Br. in Opp. 12) that the government "attacks *sub silentio* the holding of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)." That is incorrect. Hamdi did not challenge any detention by a multinational force acting under international authority; he challenged his detention in the United States by U.S. forces acting solely under domestic authority. *Id.* at 511. Thus, as the court of appeals explained (Pet. App. 9a), neither *Hamdi* nor any of the other cases cited by respondent (Br. in Opp. 16-18) involved the question here. See Gov't Pet. Resp. at 11-13, *Munaf*, *supra*.

Respondent attempts to evade this basic distinction by asserting that the government has conceded that the United States personnel who are holding him "operate 'subject to' no independent [Multinational Force-Iraq (MNF-I)] authority." Br. in Opp. 3, 14, 16 (quoting Pet. App. 14a). Not so. The government has made clear throughout this litigation that the MNF-I is an international entity distinct from the United States and that, while the MNF-I is under unified American command, the same was true of the multinational force in *Hirota*. See, *e.g.*, Gov't C.A. Br. 5-6, 30; Gov't C.A. Reply Br. 5-6; 9/11/2006 Tr. 10-13, 20-21.

Respondent tries (Br. in Opp. 3, 14, 16) to manufacture a concession from snippets of the oral argument in the court of appeals. But as explained (Pet. 12 n.3), the government explicitly stated that it would "mischaracteriz[e]" its position to say that United States forces do not operate "subject to the multi-national authority."

9/11/2006 Tr. 20-21. Likewise, the government repeatedly made clear its position that the basic "relationship between the United States and the multi-national force that it's acting a part of is no different than the relationship between the United States and the allied powers [in *Hirota*]." *Id.* at 12-13; see *id.* at 10-11.[1]

In any event, the court of appeals itself recognized that this case is like *Hirota* in that respondent is detained abroad by a multinational force, but nevertheless held that "the critical factor in *Hirota* was the petitioners' convictions by an international tribunal." Pet. App. 11a, 12a. Thus, the question whether *Hirota* is so limited is squarely presented.

2. Respondent suggests (Br. in Opp. 23-24) that the jurisdictional question is not sufficiently important to warrant this Court's review. But the detainee in *Munaf*, represented by respondent's counsel, is seeking review of the same question and has suggested that it has "surpassing importance." Pet. at 10, *Munaf*, *supra*. To the extent that respondent seeks to minimize the potential breadth of the court of appeals' ruling by arguing that it is by its terms limited to citizens, his suggestion has no support in the text of the opinion below. To the contrary, the court of appeals declined to base its jurisdictional rule on the *citizenship* of the habeas petitioner and held instead that "the critical factor in *Hirota* was

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[1] Respondent's use of an ellipsis (Br. in Opp. 3) in characterizing the government's response to the question whether it "agree[d] with the District Court that Omar is in the authority and control of the United States" (9/11/2006 Tr. 11-12) is highly misleading. The full response was: "It is, Your Honor, as it was in the Hirota case. And I want to be clear on that. In the Hirota case, the Supreme Court made clear, and certainly Justice Douglas made clear in its decision, that petitioner was being physically held by United States forces." *Id.* at 12.

the petitioners' convictions by an international tribunal." Pet. App. 12a. And in *Munaf*, the court of appeals expressly stated that citizenship is not relevant to that jurisdictional holding. 482 F.3d at 583-584.

In any event, the jurisdictional question plainly warrants review. As the district court in *Munaf* observed, "no court in our country's history, other than [in the *Omar* case], has ever found habeas corpus jurisdiction over a multinational force comprised of the United States acting jointly with its allies overseas." *Mohammed* v. *Harvey*, 456 F. Supp. 2d 115, 130 (D.D.C. 2006). Likewise, as Justice Jackson observed with respect to *Hirota*, the exercise of judicial review in such circumstances may directly interfere with the conduct of the Nation's foreign affairs and our international commitments. See *Hirota* v. *MacArthur*, 335 U.S. 876, 878 (1948) (statement respecting oral argument); Pet. 25.

B. The Injunction Question Warrants Review

This case presents a complementary and equally important question concerning the courts' exercise of their asserted jurisdiction. The court of appeals affirmed an "uprecedented" injunction (Pet. App. 37a (Brown, J., dissenting in part)) barring the MNF-I from: transferring respondent to Iraqi authorities; sharing with the Iraqi government details concerning any release of respondent; or allowing respondent to appear before Iraqi courts to answer for alleged crimes committed in Iraq. *Id.* at 20a, 23a, 25a. That injunction not only intrudes on the Executive's war powers and foreign affairs functions, it bars a foreign sovereign from trying individuals for offenses committed within its own borders, in direct contravention of this Court's precedent. See Pet. 16-24; Pet. App. 33a-37a (Brown, J., dissenting in part).

1. Respondent argues (Br. in Opp. 13) that this Court should deny review because "the consequences about which the government complains do not follow from the *preliminary* injunction," but instead "flow from a hypothetical *permanent* injunction." But there is nothing "hypothetical" about the injunction at issue. That injunction blocks the MNF-I from transferring respondent to Iraqi custody *now*. It blocks the MNF-I from communicating with Iraqi authorities about any release of respondent *now*. And it blocks the MNF-I from permitting the Iraqi courts to try respondent *now* for crimes committed in that country. Thus, the embarrassment to the Executive in its conduct of foreign affairs, and the affront to Iraqi sovereignty, are occurring *now*.[2]

2. Respondent argues (Br. in Opp. 13, 26-29) that the injunction is a "discretion[ary]" application of the district court's authority to preserve its asserted jurisdiction to adjudicate the case. As respondent concedes (*id.* at 32), however, whether to grant a preliminary injunction turns in part on a plaintiff's "*likelihood* of success on the merits." See Pet. App. 20a; *id.* at 35a (Brown, J., dissenting in part). The district court erred in entering a preliminary injunction against the transfer of respondent to Iraqi custody because, as a matter of law, respondent is not entitled to that relief on the merits. *Id.* at 35a (Brown, J., dissenting in part); Pet. 17-22. Thus, the legal questions presented here concerning the MNF-I's authority to transfer respondent to Iraqi cus-

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[2] Respondent asserts (Br. in Opp. 30 n.17) that "[t]here is no evidence in the record * * * that any [Iraqi] proceedings ever began." But the injunction was requested—and entered—to block such proceedings. See Pet. App. 41a-42a, 104a.

tody are directly relevant to—indeed, dispositive of—the validity of the preliminary injunction.

This Court has granted review of other preliminary injunctions under similar circumstances. See, *e.g.*, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004); *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001); *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533 (2001); *Saenz* v. *Roe*, 526 U.S. 489 (1999).

3. Respondent argues (Br. in Opp. 31) that the government forfeited its challenge to the preliminary injunction because, in the lower courts, "the government argued *only* that the court lacked jurisdiction." Quite to the contrary, most of the government's court of appeals brief raised non-jurisdictional arguments. Compare Gov't C.A. Br. 21-32 (arguing that the courts lack jurisdiction under *Hirota*), with *id.* at 33-59 (arguing that "the district court's injunction violates fundamental principles of the constitutional separation of powers," *id.* at 33, and exceeds the scope of permissible relief); and Gov't Reply Br. 4-18 (jurisdiction), with *id.* at 18-31 (injunction). The government argued that, even apart from *Hirota*, the courts lacked authority to enjoin the "[t]ransfer of [respondent] to Iraqi physical custody." Gov't C.A. Br. 58; see *id.* at 34-41, 46, 48, 50-54, 58-59.

Moreover, the court of appeals majority specifically addressed the government's challenge to the preliminary injunction. See, *e.g.*, Pet. App. 20a. And the dissent pointedly joined issue on the validity of the injunction. *Id.* at 34a-35a. Thus, the validity of the injunction was both pressed and passed upon in the court of appeals—either of which is sufficient to preserve the issue

for this Court's review. See, *e.g.*, *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

It is true that the court of appeals majority tried to side step the government's argument that no statutory or treaty authorization is required for the Executive to transfer a person captured within a foreign country to that country's custody for trial under the laws of that country. See Pet. App. 25a; see also Gov't C.A. Br. 44; Gov't C.A. Reply Br. 26. As explained (Pet. 17-18), however, that effort serves only to underscore the court of appeals' error and the need for this Court's review; it certainly does not lessen the need for further review.

Furthermore, the court of appeals' decision sustaining the injunction directly conflicts with *Wilson* v. *Girard*, 354 U.S. 524 (1957), in which, as Judge Brown explained, this Court "reversed an injunction against transfer very much like the one at issue here." Pet. App. 36a n.5; see Pet. 18-19. As respondent recognizes, *Wilson* reversed an injunction against the United States' transfer of an American soldier within Japan to Japanese authorities for prosecution under Japanese law because, as in this case, "no statute *affirmatively precluded* transfer." Br. in Opp. 33 (emphasis added); see *Wilson*, 354 U.S. at 529-530. That result follows from the foreign sovereign's "exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." *Id.* at 529; see Pet. App. 35a-36a (Brown, J., dissenting in part).[3]

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[3] That does not mean, as respondent asserts (Br. in Opp. 34), that the government could surrender United States citizens "in the United States" for prosecution abroad without treaty or statutory authorization. That is an extradition. But the transfer of a fugitive like respondent *within* a foreign country is not an extradition, and thus is not

4. Respondent objects (Br. in Opp. 35) that he has not yet developed a full record on "his innocence." But the procedural posture of this case is no barrier to reviewing the *legal* questions presented, and leaving the injunction in place and allowing fact finding or discovery would only exacerbate the intrusion on the sovereign prerogatives of Iraq, our international commitments, and the Executive's conduct of foreign affairs. Moreover, such inquiries are no more relevant to the validity of the injunction against transfer than they were in *Wilson*. It is for the Iraqi courts to gather and assess the evidence against respondent and determine whether to convict him under Iraqi law for any offenses committed in Iraq, and it is well-settled that United States courts may not be used to collaterally attack such foreign proceedings. See *Neely* v. *Henkel (No. 1)*, 180 U.S. 109, 123 (1901); see Pet. 17-23; Pet. App. 36a (Brown, J., dissenting in part).[4]

Similarly, evidence about whether respondent would be mistreated by Iraqis (Br. in Opp. 35) is irrelevant to these judicial proceedings. The United States would object to the MNF-I's transfer of respondent to Iraqi custody if it believed that he would be tortured. Under

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limited by the rules governing extraditions. See Pet. 17; Pet. App. 35a-36a (Brown, J., dissenting in part). The statement in a district court pleading cited by respondent is not to the contrary; that statement addressed the need for extradition in the hypothetical event that respondent were returned to the United States, not respondent's transfer *within* Iraq. See Br. in Opp. 23 n.11.

[4] Respondent is incorrect in saying (Br. in Opp. 35) that he has "had no opportunity to demonstrate his innocence." Respondent was afforded a hearing by an MNF-I panel modeled on Article 5 of the Geneva Convention, see Pet. 14 n.4—process that *Hamdi* indicated would be constitutionally adequate for a citizen enemy combatant detained in the United States. See 542 U.S. at 538.

the Rule of Non-Inquiry, however, the Executive has sole discretion to make that determination, which can rest on the Executive's assessment of the reliability of diplomatic assurances. Pet. 20-21 & n.9; Pet. App. 38a n.6 (Brown, J., dissenting).[5]

C. The Court Should Grant The Petition In This Case And Hold The Petition In *Munaf*

While this case and *Munaf* present the same threshold jurisdictional issue, this case provides a better vehicle for considering the full set of issues concerning the authority of United States courts to review the detention and transfer of individuals captured abroad by a multinational force operating under international authority, because of the injunction entered by the district court in this case. Pet. 26. In addition, the *Munaf* petitioners have agreed that, if the Court grants the petition in this case, it should hold the *Munaf* petition pending its disposition of this case. See Reply at 2, *Munaf*, *supra*. Alternatively, this Court could grant both petitions and consolidate the cases for oral argument.[6]

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[5] Respondent's contention (Br. in Opp. 2) that the factual allegations of his habeas petition must be taken as true is incorrect. Because this case comes before this Court on review of a grant of a preliminary injunction, not on a motion to dismiss for failure to state a claim, the facts in the habeas petition are *not* assumed to be true. See, *e.g.*, Fed. R. Civ. P. 65(a)(2) (providing for the receipt of "evidence * * * upon an application for a preliminary injunction").

[6] The contention in the *Munaf* reply (at 1) that the government has "[r]etreat[ed] from its position below," and that the Court should grant, vacate, and remand *Munaf* in light of a changed position, is baffling. The government has always argued that the United States courts lack habeas jurisdiction under *Hirota* whenever a multinational force acting under international law detains an individual. *E.g.*, Gov't C.A. Br. at 17-21, *Munaf*, *supra*; Gov't Pet. Resp. at 10-13, *Munaf*, *supra*. The gov-

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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NOVEMBER 2007

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ernment has also argued, in the alternative, that Munaf's criminal conviction by an Iraqi court provides a further reason for dismissing his habeas petition, in part because that petition amounts to an impermissible collateral attack on his foreign conviction. *E.g.*, Gov't C.A. Br. at 48-56, *Munaf*, *supra*; Gov't Pet. Resp. at 15-17, *Munaf*, *supra*. There has been no "retreat" from any position.